Memorandum by AT&T Corp. **February 20, 2004**
WC Docket No. 02-361

AT&T Corp. ("AT&T") submits this memorandum in response to recent *ex parte* letters by SBC Communications, Inc. ("SBC"), Verizon, BellSouth Corporation ("BellSouth") and Qwest in the above-captioned docket.[1] The Bells urge the Commission not only to change course and allow them to *begin* to impose their investment-retarding legacy access charges on phone-to-phone voice over internet protocol ("VOIP") traffic, but to rule that such services have secretly been accruing access charges all along and that the Bells are now free to insist on back payments that they never attempted to collect at the time the services were provided and that are in addition to the fully compensatory termination fees they have already been paid. The Bells contend that notwithstanding the Commission's contrary statements, an entire industry's contrary understanding, and the Bells' contrary conduct, the Commission is compelled by law to adopt the retroactive rule that they seek. As detailed below, that is plainly wrong. Indeed, it is the Bells' proposal that the Commission rewrite history – and, in the process, send a clear message to investors and industry participants that this is a Commission that is more interested in the Bells' pocket-books than in the public interest – that would invite reversal by the court of appeals.

I. The Consistent Statements And Actions Of The Commission, Individual Commissioners, The Entire Industry, And The Trade And Popular Press All Confirm That The Commission Has, Since The 1998 *Report to Congress*, Interpreted Its Access Charge Rules Not To Apply To Phone-to-Phone VOIP Traffic.

In the *Report to Congress*, (13 FCC Rcd. 11501 (1998)) the Commission expressly recognized that its tentative classification of phone-to-phone VOIP as a "telecommunications

[1] *See* January 14, 2004 Letter from James C. Smith, Senior Vice President, SBC Telecommunications, Inc. to Chairman Michael K. Powell ("SBC Mem."); January 22, 2004 Letter from Kathleen Grillo, Vice President Federal Regulatory Advocacy, Verizon to Marlene H. Dortch, Secretary ("Verizon Mem."); January 9, 2004 Letter from Glenn T. Reynolds, Vice President Federal Regulatory, BellSouth Corporation to Marlene H. Dortch, Secretary, ("BellSouth Mem"); February 3, 2004 Letter from Andrew D. Crain, Associate General Counsel, Qwest to Marlene H. Dortch, Secretary ("Qwest Mem.").

service" did not mean that such services were subject to access charges. To the contrary, the Commission explained that, "to the extent we conclude that certain forms of phone-to-phone [VOIP] service[s] are 'telecommunications services,' and to the extent the providers of those services obtain the same circuit-switched access as obtained by interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we *may* find it reasonable that they pay *similar* access charges." *Report to Congress* ¶ 91 (emphasis added). The clear import of this language is that the Commission (1) interpreted its access charge rules as *not* currently applying to these VOIP services, and (2) would decide in the future whether, due to changed circumstances, it could be appropriate, on a going forward basis, to impose charges "*similar*" to access charges.

The Bells strain to show that this statement merely reflects the Commission's intention to defer to some future proceedings the decision *whether* access charges were then accruing on some forms of VOIP, or *whether* at some future date it should *exempt* some forms of VOIP from the otherwise applicable access regime. *See* SBC Mem. at 5-6; BellSouth at 3. These efforts are wholly unavailing. To paraphrase SBC, the Commission never says in paragraph 91 – or anywhere else in the *Report* for that matter – that it will decide in the future to apply access charges to some types of VOIP traffic, or whether to exempt some types of that traffic from access charges. SBC Mem. at 5-6. By stating that it would decide in the future whether it might be "reasonable that [VOIP providers] pay *similar* access charges," *Report to Congress* ¶ 91 (emphasis added), the Commission made clear that access charges themselves do *not* apply to such traffic. The question to be decided in the future was whether to authorize the assessment of fees *similar* to access charges. If, by contrast, the Commission intended to suggest that it might later find that access charges did apply, it would have simply have said that VOIP providers may have "to pay access charges"—not something "similar" to those charges. And if the Commission meant to suggest that some VOIP services were *already* then accruing access charges, then it assuredly would have put the industry on notice of that view.[2]

Not surprisingly, the entire industry – including the Commission itself – understood the *Report* as setting forth a determination that access charges would *not* apply to phone-to-phone VOIP traffic and that VOIP providers could continue to purchase other LEC termination services unless and until the Commission, in the future and on a prospective basis, ruled that something *like* access charges should apply to those services. As then-Chairman Kennard explained in 2000, it "doesn't make sense to apply hundred-year old regulations meant for copper wires and giant switching stations to the IP networks of today."[3] Most significantly, in a Notice of Proposed Rulemaking issued the following year, the full Commission itself expressly stated that "Internet Protocol (IP) telephony threatens to erode access revenues for LECs because *it is exempt from the access charges* that traditional long-distance carriers must pay."[4] Since then, individual Commissioners have continued to express the view that VOIP is not subject to access regulations.[5] And in 1999, US West acknowledged the public understanding that phone-to-

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[2] *See also* Separate Statement of Commissioner Powell ("The infinite flexibility of IP switched-packet networks[ ] has blurred the[ ] distinctions [between telecommunications and information services], making them difficult, if not impossible, to maintain. As we are seeing, one now can transmit voice, in addition to data, using a protocol that allows for a significant degree of computer processing and other advanced capabilities. . . . If innovative new IP services were all thrown into the bucket of telecommunications carriers, we would drop a mountain of regulations, and their attendant costs, on these services and perhaps stifle innovation and competition in direct contravention of the Act").

[3] Chairman William E. Kennard, Remarks Before the Voice Over Net Conference, Atlanta, Georgia (Sept. 12, 2000).

[4] Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime,* 16 FCC Rcd. 9610, ¶ 133 (2001) (emphasis added) ("*Intercarrier Compensation NPRM*").

[5] *See*, *e.g.*, Welcoming Remarks by Kevin J. Martin, Commissioner, FCC, delivered to the African VOIP Conference, Supercomm 2002, Atlanta, Ga., June 5, 2002, at 2 ("[W]e have not

phone VOIP services are not subject to access charges, for it then asked the Commission to "declare" that certain phone-to-phone VOIP services are subject to access charges, stating that it was *not* seeking a ruling that would apply to phone-to-phone services (like AT&T's) that are transmitted over Internet backbones. Notably, the Commission not only failed to act on the petition, it never even issued a Public Notice of the petition or otherwise sought comment on it.

In light of the Commission's consistent statements and (in)actions, it should come as no surprise that other regulators and industry participants likewise believed that phone-to-phone VOIP providers had no obligation to purchase tariffed access charge services to terminate their traffic. In testimony before the Texas House of Representatives, for example, the Chairman of the Texas Public Utilities Commission, Patrick Wood, testified in 2000 that "[t]he FCC has said

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chosen to regulate IP Telephony, but are continuing to monitor marketplace developments. We refuse to just assume that it is a new form of an old friend. . . . Indeed, VOIP presents an incredible opportunity for consumers worldwide and we have found that our approach has encouraged its development"); *Kennard Says He Won't Regulate Internet Telephony*, Warren's Washington Internet Daily, May 25, 2000 ("It's important to recognize that legacy regulation is not necessarily appropriate to emerging network technologies, so when people start asking 'when are you going to regulate IP telephony,' my answer is always the same – never"); Remarks of Michael K. Powell, Chairman, FCC, delivered at the ITU 2nd Global Symposium for Regulators, Geneva, Switzerland, Dec. 4, 2001, at 3 (Commission has refused to treat VOIP as a "new form of an old friend" by subjecting it to the regulations applicable to circuit switched services); November 5, 2003 Letter from Michael Powell to Senator Wyden ("I urge caution in addressing VoIP issues. There is universal agreement that these Internet services hold great promise for the American people. Imposing regulatory burdens on these new and emerging Internet services, before the FCC fully engages the public and develops a comprehensive record, may have the unintended consequence of stifling its growth and denying the public benefits of that growth"); Remarks of Commissioner Susan Ness to the ITU World Policy Forum Information Session on IP Telephony, Geneva, Switzerland, March 6, 2001 ("In our *Report to Congress*, we declined to regulate IP telephony. . . . We more recently have stated that as Internet-based services begin to compete with legacy (traditional telecommunications) services and there is real competition in the marketplace, policy makers can begin to deregulate the legacy services - in other words 'level' the regulatory playing field by deregulating incumbents rather than by imposing legacy regulations on new entrants that lack market power").

that [Voice Over Internet] *does not pay access charges*."[6] Since then, two state commissions have expressly held that access charges do not apply to such services.[7]

Similarly, the trade press, academic commentators and the mass media have all recognized that VOIP traffic is not today subject to access charges. Even before the Commission explicitly stated, in the *Intercarrier Compensation NPRM*, that such traffic was "exempt" from access charges, a *Legal Times* article reported that "VoIP providers, unlike traditional long distance carriers, do not have to pay 'access charges.'"[8] The following year, an article in *The Computer & Internet Lawyer* likewise stated that even "phone-to-phone Internet telephony," which may "begin and end over an ordinary telephone handset and sound no different than a PTSN call"—precisely the type of VOIP service that AT&T today provides—"remain[s] exempt from common carrier regulations," including "access fees."[9] And the 2003 Catholic University CommLaw Conspectus states without qualification that "the current regulatory regime exempts VOIP providers from the obligation to pay hefty access charges."[10]

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[6] Testimony of Chairman Patrick Wood, Texas Public Utilities Commission, before Texas House of Representatives Committee on State Affairs, Subcommittee on Cable and Broadband, Transcript of Proceedings, pp. 32-34 (May 2, 2000) (emphasis added).

[7] *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West Communications, Inc.*, No. C00-858 (Col. Pub. Util. Comm'n Aug. 1, 2000); *Investigation of Appropriate Methods To Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996*, No. 000075-TP (Fl. Publ. Serv. Comm'n Nov. 21, 2001).

[8] Mike Senkowski and Jeff Linder, "Is it a Zebra or a Striped Horse? Internet Telephony Challenges Traditional Regulatory Distinctions," *Legal Times* (May 8, 2000).

[9] Robert S. Metzger & Benjamin P. Broderick, *Communications Convergence*, The Computer & Internet Lawyer (Oct. 2001).

[10] Cherie R. Kiser and Angela F. Collins, "Regulation on the Horizon: Are Regulators Poised to Address the Status of IP Telephony?," 1 CommLaw Conspectus 19 (2003).

Numerous recent articles in general circulation newspapers and magazines have likewise reflected this same understanding.[11] Indeed, this is true of the *Forbes* article that BellSouth cites as "support" for its preposterous claim that "no one in the telecommunications industry (with the possible exception of AT&T) seriously questioned the fact that [VOIP] traffic was – and always has been – subject to access charges." BellSouth at 4 & n.16. That article reports that MCI has migrated 10% of its traffic "from old circuit-switched networks—subject to those antiquated access fees—to the Internet, *which is free of them*." Neil Weinberg, *Screaming Match*, Forbes, Oct. 13, 2003 (emphasis added).

The Bells' revisionist view cannot be squared even with their own consistent behavior. Although they now claim that it has always been clear that access charges applied to this traffic, the Bells, *for years*, never seriously attempted to insist that phone-to-phone VOIP providers purchase termination out of access tariffs. SBC attempts to brush aside this evidence of its own clear understanding by suggesting that AT&T and others engaged in deception and "hid the true nature of [their] terminating traffic from SBC." SBC Mem. at 9. This accusation is utterly baseless. In fact, when AT&T terminates such calls over ILEC local business lines, it provides both the called and calling party numbers. It is thus readily apparent to an ILEC when a call terminating over such a line originated outside the local calling area. US West's 1999 petition which announced to the Commission and the entire industry that AT&T and others were delivering VOIP telephone calls over local business lines (and thus without buying termination

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[11] *See*, *e.g.*, Peter Burrows, Roger O. Crockett, Steve Rosenbush, and Charles Haddad, "Net Phones Start Ringing Up Customers," *Business Week* (Dec. 29, 2003) ("VoIP . . . will allow competitors like Time-Warner and AT&T to reach consumers without paying hefty access charges."); Kristi E. Schwartz, "AT&T Joins Voice Over Internet Race," *Palm Beach Post* (Dec. 12, 2003) (VoIP "calls are free from access charges"); Reinhardt Krause, "Internet Telephony Puts Bells on Hook," *Investor's Business Daily* (Nov. 24, 2003) ("Because VoIP calls use the Internet or private IP networks, service providers like Vonage avoid access charges").

services out of access tariffs) starkly confirms that there was no deception. Yet, even after US West filed the petition, the Bells still did not attempt to impose access charges on terminating VOIP traffic.

In this regard, BellSouth's suggestion that it has long collected access charges for VOIP traffic, including AT&T's, BellSouth Mem. at 4, rests on an irrelevancy. The only access charges that AT&T pays on phone-to-phone IP calls – to BellSouth and others – are for the Feature Group D access lines that AT&T ordered out of access tariffs. Although AT&T could have avoided originating access charges by purchasing ordinary business lines to originate traffic, that would have required its customers to experience the inconvenience of two-stage dialing. To allow customers to engage in 1+ dialing, AT&T *chose* to order Feature Group D access lines to connect customers to its local IP gateway. *See* Petition for Declaratory Ruling at 18-19. When AT&T orders these access services pursuant to tariffs that impose originating access charges, AT&T pays those access charges – just as information service providers are subject to access charges if they choose to order Feature Group D lines (and not business lines) to originate their services. The payment of access charges on Feature Group D lines is neither evidence that BellSouth or other ILECs have long collected access charges on all VOIP traffic, BellSouth at 4, nor a tacit concession that every VOIP telephone call that crosses a LATA boundary is subject to access charges. SBC Mem. at 5-6. Rather, it merely reflects the fact that, where AT&T *chooses* to use certain ILEC services and facilities to carry a call across a LATA boundary, it must pay the tariffed rate for those facilities. On the terminating end of an IP telephone call, however, AT&T, consistent with the *Report* and years of established industry practice, uses business lines that it purchases under tariffs or other arrangements that do not impose access charges, and AT&T therefore does not pay terminating access charges for such calls.[12] The reason it does not pay – and that, until recently, no ILEC attempted to collect – such charges is that all participants in the industry understood that this VOIP traffic was exempt from access fees and would remain so unless and until the Commission prospectively ruled otherwise.[13] In short, it is undeniable that the entire industry understood the *Report to Congress* to provide interpretation of the scope of Rule 69.5 – whether characterized as a "waiver" or an "exemption" – that permitted VOIP providers to invest without fear that their new services, which were never contemplated when the access rules were first created, would be burdened with crippling access charges.

Faced with the language of the 1998 *Report* itself and the Commission's even more explicit statements and actions since then, the Bells try to parse these pronouncements in an effort to show that they cannot bear the meaning that the entire industry has ascribed to them. This after-the-fact attempt to manufacture ambiguity where none exists is baseless.

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[12] BellSouth misleadingly attempts to suggest otherwise by attaching to its January 28, 2004 *ex parte* letter a 1998 Customer Letter/Announcement that states that phone-to-phone VOIP providers "should use one of BellSouth's access service offerings" and that "BellSouth will no longer provide local exchange service to companies providing long distance service." But BellSouth plainly never took that position seriously, because in the real world BellSouth continued to sell business lines to AT&T and other VOIP providers with full knowledge that those lines were being used to terminate VOIP traffic. Thus, like Qwest's 1999 request for declaratory ruling, BellSouth's letter only confirms that the Bells were aware that AT&T and others were providing VOIP telephony services over local business lines, and consistent with the Commission's pronouncements, acquiesced for years in that use.

[13] Verizon argues that MCI and Sprint are paying access charges on VOIP traffic. Verizon Mem. at 17. As Verizon acknowledges, however, MCI previously did not pay such charges, *id.*; its current practice reflects a settlement with Verizon driven by MCI's unique need to secure approval of its bankruptcy plan of reorganization in the face of a number of disputes with Verizon and the other Bells, not by any belief on the part of MCI that phone-to-phone VOIP services have always been subject to access charges. And while Verizon "presum[es]" that Sprint is paying access charges, *id.*, Sprint has in this very proceeding acknowledged that the Commission "created an [access charge] exception for phone-to-phone IP telephony [that is a telecommunications service]." Sprint at 7. That is a critical concession given that Sprint's value, like Verizon's, is largely based on incumbent local exchange operations.

With respect to the 1998 *Report*, the Bells argue, in effect, that (1) phone-to-phone VOIP is indistinguishable from "telecommunications services," (2) by its plain terms, Rule 69.5(b) imposes access charges on all such services, thus (3) the Commission had no discretion to interpret its own rule to determine that access charges should not apply to new VOIP services. This syllogism, however, is false. As AT&T has previously explained, the Commission not only had the discretion, but the *duty* to decide whether its generally applicable access charge rules should apply to new VOIP services that were not contemplated when those rules were promulgated. *See WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, established the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases").

Indeed, the Commission expressly recognized in the 1998 *Report* itself that the applicability of access charges to particular services does not turn solely on the language of the access rules, but depends in part on a policy judgment. For example, in deciding whether VOIP should someday pay charges "*similar*" to access charges the Commission recognized that it would "likely face difficult and contested issues." *Report to Congress* ¶ 91 (emphasis added). That statement would have made no sense if, as the Bells assert, the Commission is limited to mechanical application of the language of the general access charge rule.

Of course, the Commission is not so limited, and it has always maintained a fluid line between those entities that must pay carrier access charges and those that are exempted for various policy reasons. From the very beginning, the Commission has recognized that it would have to interpret its access charge rules flexibly to reflect evolving technologies and policies: "No one, and no commission, can predict the future of telecommunications with any degree of certainty. Our access charge plan is, in our opinion, the best plan for the present and immediate future that can be devised based upon our present level of knowledge. We remain committed to careful monitoring of developments in the field of common carrier telecommunications and to make any adjustments that may be warranted, based upon these future developments, to serve the public interest." Third Report and Order, *MTS and WATS Market-Structure*, 93 F.C.C.2d 241, ¶ 368 (1983).

In the ensuing two decades, the Bells themselves have been frequent champions of the Commission's authority to apply its access charges rules flexibly to serve the public interest. *See*, *e.g.*, SBC Comments, CCB/CPD Docket No. 98-61 (filed November 13, 1998) ("*WAIT Radio* . . . . allows the Commission to apply or limit the rule as it sees fit"); BellSouth Comments, CCB/CPD Docket No. 98-61 ("the Commission has on many occasions granted waivers of general industry application, where a set of circumstances common to all makes enforcement of the rule inconsistent with the public interest"). And the court of appeals has not hesitated to reverse where the Commission has, at the Bells' urging, mechanically applied its access charge rules without regard to whether that makes sense. *See*, *e.g.*, *C.F. Communications* v. *FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997) ("The Commission simply – and, we think, unreasonably – ignored context and stated that we must apply our rules as they are now codified…The Commission put on blinders after it found that CFC did not meet its definition of 'public telephone,' not acknowledging that the definition had been adopted in a different context") (internal citation omitted). Thus, the Bells' suggestion that the Commission had to determine that its access charge rules apply to VOIP – and that the 1998 *Report*, therefore, cannot plausibly be understood to have announced a contrary determination – is simply wrong.

The Bells' attempt to dismiss the Commission's subsequent confirmation that VOIP is, in fact, "exempt from . . . access charges," *Intercarrier Compensation NPRM*, ¶ 133, is even more labored. SBC tries to limit this express statement by quoting a different paragraph from the general background section of the *NPRM*, where the Commission noted that "long-distance calls handled by ISPs using IP telephony are generally exempt from access charges." *Id.* ¶ 6. Based on this quote, SBC argues that only long distance calls "*handled by ISPs* using IP telephony" are exempt, not long distance calls "handled by interexchange carriers." SBC Mem. at 6 n.23 (quoting *Notice* ¶ 6). But in a footnote to the very paragraph SBC cites, the Commission explained that it was using the phrase "IP telephony" to encompass "the provision of a telephony service or application using Internet Protocol," including "phone-to-phone IP telephony" that, like AT&T's service, used "two standard telephones that connect through two IP gateways." *Intercarrier Compensation NPRM* n.5.

II. The Commission Had Ample Authority To Construe Its Own Rules Not To Require Phone-to-Phone VOIP Providers To Purchase Termination Out Of Access Tariffs.

The Bells claim that the *Report* cannot have the effect the Commission and industry have long accorded it because it was not issued in accordance with the requirements of the Administrative Procedure Act ("APA"). This claim is frivolous. In fact, the *Report was* issued after public notice and extensive comment. In all events, the *Report* is best understood as simply an interpretation by the Commission of its own access charge rules – *i.e.*, a determination that these entirely policy-based rules do not apply to VOIP traffic and that such traffic is, in the Commission's own words, "exempt from . . . access charges" – which the Commission was free to issue without engaging in notice and comment rulemaking.

Agencies can, and frequently do, issue interpretations of their regulations through informal means, such as opinion letters. *See Christensen* v. *Harris County*, 529 U.S. 576, 587

(2000) (letter of Administrator of Labor Department's Wage and Hour Division); *Air Transport Ass'n of America* v. *FAA*, 291 F.3d 49 (D.C. Cir. 2002) ("*ATAA*") (letter of Deputy General Counsel). Where an interpretation simply spells out the scope of a "duty fairly encompassed within the regulation that the interpretation purports to construe," and "does not impose 'new rights and duties,'" it is an "interpretative rule" that is exempt from the APA's notice and comment requirements. *ATAA*, 291 F.3d at 55-56. The 1998 *Report* does not purport to impose any new rights and duties. Instead, it purports only to delineate the scope of a duty – *i.e.*, the duty to pay access charges – that is fairly encompassed within the access regulation the Commission was interpreting. Accordingly, the *Report*'s interpretation of that regulation is plainly an interpretative rule. Indeed, the very "procedural infirmities" the ILECs point to – such as the failure to publish the *Report* in the Federal Register, SBC Mem. at 9 – *confirm* that the *Report* is an interpretative rule, not a legislative or substantive rule for which notice and comment was required. *See ATAA*, 291 F.3d at 56 n.9; *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986).

SBC acknowledges these principles, but contends that, because (in its view) the *Report* worked a major substantive change in the access regulations, such a change cannot escape notice and comment requirements by being labeled a "mere interpretation." SBC Mem. at 8 n.30. "To succeed with this argument," however, the Bells "must show that the '[Commission] ha[d] given its regulation a definitive interpretation and later significantly revise[d] that interpretation.'" *Darrell Andrews Trucking, Inc.* v. *Federal Motor Carrier Safety Admin.*, 296 F.3d 1120, 1125 (D.C. Cir. 2002) (quoting *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)). The Bells have not even attempted to make such a showing, nor could they.

It is undisputed that the Commission had never previously interpreted the access charge regulations to apply to VOIP. Indeed, the entire premise of the Bells' submissions is that the Commission has still not decided, to this very day, whether access charges apply to such traffic. There is absolutely no basis, therefore, for claiming that the *Report*'s determination that the access rules do not apply to VOIP constituted a "change" or "modification[]" of the access charge rules themselves, *see* SBC Mem. at 8-9. There was no "definitive interpretation" addressing this question for the Commission to modify in 1998. Accordingly, the Commission was not required to engage in notice and comment rulemaking in order to issue a report that interpreted section 69.5(b) not to apply to VOIP, and Commission enforcement of that interpretation would not violate the APA or constitute reversible error. *Id.* at 9.

III. Even if the Commission Determines That Increased VOIP Traffic Or Other Changed Circumstances Now Justify Application Of Access Charges To Phone-to-Phone VOIP Services, The Commission Is Not Required To Give That Ruling Retroactive Effect And, Indeed, Would Commit Reversible Error By Doing So.

As AT&T and many others have elsewhere explained, it makes no more sense today to burden any VOIP providers with legacy access charge regulation than it did in 1998 when the *Report* issued. Should the Commission disagree, however, it is certainly under no obligation to give such a decision retroactive effect. To the contrary, giving such a decision retroactive effect would itself constitute reversible error.

First, because, as just shown, the 1998 *Report* announced an interpretative rule that access charges do not apply to VOIP traffic, there is no need to engage in a balancing inquiry. Rather, in such circumstances, retroactive application of a new, contrary rule is flatly impermissible. Second, even if the *Report* had not announced such an interpretative rule and merely left the question open, the relevant balance of factors weighs overwhelmingly in favor of prospective-only application of any "clarification" of the access rules the Commission announces in this proceeding.

Retroactivity is prohibited. In claiming that the Commission would commit reversible error if it failed to give retroactive effect to a determination that VOIP services should now be subject to access charges, the Bells contend that, "[i]n cases in which there are 'new applications of existing law, clarifications, and additions,'" there is a presumption in favor of retroactivity. *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). Because the 1998 *Report* announced an interpretative rule, however, a decision that VOIP should now be subject to access charges would not be a "new application of existing law," but rather "a substitution of new law for old law that was reasonably clear." *Id.* "[I]n a case in which there is a 'substitution of new law for old law that was reasonably clear,' a decision to deny retroactive effect is uncontroversial." *Id.*. Indeed, "the new rule may justifiably be given prospective-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" *Id.* That is plainly the proper – indeed, required – course of action here. AT&T and other VOIP providers had every reason to rely on the Commission's consistent statements and actions. It would plainly upset "the settled expectations of those who [like AT&T] had relied on" that preexisting determination.

Retroactivity is improper even under a balancing test. Even if a decision to require payment of access charges simply involved a new application of existing law, retroactive application of such a "clarification" would still be manifestly unjust and improper. In cases involving new applications of existing law, an agency must balance the "ill effect" of retroactivity against "the mischief of producing a result which is contrary to statutory design," if any, that would result from a prospective only ruling. *SEC* v. *Chenery*, 332 U.S. 194 (1947).

Here that balancing admits of only one sustainable answer, because the Bells have identified *no* statutory purpose that would be advanced by applying access charges *retroactively* to VOIP services. And whatever one's view of the reasonableness of the entire industry's reliance on what the Commission said and did, there can be no serious argument that retroactive application of access charges would have a host of serious ill effects. With nothing on one side of the scale (the statutory interest side) and something on the other (the ill effects of retroactivity side), a prospective only ruling is plainly required.

The Bells have not identified any "*statutory* interest in applying a new rule despite the reliance of a party on the old standard." *Clark-Cowlitz Joint Operating Agency* v. *FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (emphasis added). The Commission and the states have endorsed a number of different charging regimes for a LEC's "last mile" delivery of traffic to and from consumers. All are more than compensatory; some, like access charges, generate windfalls. As all industry participants, including the Bells, have long recognized, there is no longer any logic or sound policy behind the inconsistent rules and regimes that determine which entities and services pay which rates. There can therefore be no claim that there is any legitimate statutory interest in ensuring that VOIP traffic is subject to the highest termination rates.

To the contrary, Congress' most relevant pronouncement on the subject is that the nation's communications policies must "promote the continued development of the Internet" and "preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation," 47 U.S.C. § 230(b) – the very statutory goals that underpinned the *Report to Congress*. This statement of congressional intent justifies *maintaining* the current access charge exemption for VOIP in order to foster the development of nascent VOIP services; at a bare minimum, this statutory interest weighs heavily *against* retroactive application of any decision to withdraw that exemption. In other words, any interest in retroactive payments for past period access charges is purely a Bell interest, and not a statutory interest that can be considered in the retroactivity balancing.

Nor is there any merit to Verizon's suggestion that retroactivity is required to avoid "discrimination" under section 202(a) of the Communications Act. Verizon Mem. at 20. No VOIP providers were previously obligated to pay access charges on such services. To the extent any providers did so, they acted voluntarily (as AT&T did in choosing to route its traffic over lines for which originating access charges are assessed), and not due to "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" or "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality." 47 U.S.C. § 202(a). Verizon's claim that § 202(a)'s anti-discrimination requirements compel retroactive access charge liability because AT&T's VOIP services "use local exchange switching facilities in precisely the same way as any other voice long distance services" is frivolous. Verizon Mem. at 20. AT&T's phone-to-phone VOIP services also use local exchange facilities in precisely the same way as do information services or the computer-to-phone and other VOIP services that all concede are exempt from access charges. Clearly, § 202(a), which prohibits only "unreasonable" discrimination, does not, of its own force, deny *the Commission* discretion to decide whether and when access charges should be imposed on new services. If it did, the ESP exemption would be unlawful, because services subject to that exemption use the network in the same way as services subject to access charges. However, it is elementary that the FCC has the authority to adopt different compensation regimes for different services whenever there is a "neutral and rational" basis for the distinctions that the Commission draws, either retroactively or prospectively. *See NARUC* v. *FCC,* 737 F.2d 1095, 1136 (D.C.

Cir. 1984) (rate differences for which the Commission has supplied a "neutral, rational" explanation do not violate § 202(a)).

Contrary to the Bells' claims, the statutory interest in ensuring adequate contributions to the Universal Service Fund is utterly irrelevant to any retroactivity analysis. The Fund has suffered no shortfalls during the past six years. There has been no diminution in the availability of telephone services (telephone penetration is at record levels); the Universal Service Fund was at all times fully funded (disproportionately by interexchange carriers); VOIP traffic was at all times a relatively small percentage of traffic; and the Bells earned record profits. Accordingly, there is no basis for imposing retroactive liabilities in order to advance any statutory interest in universal service.

Lacking any legitimate statutory interest in retroactivity, the Bells resort to the broad policy argument that failure to apply any "clarification" retroactively will send a message that it pays to flout the Commission's rules. This argument is utterly frivolous. AT&T did not evade or flout a clear regulatory duty by failing to pay access charges on VOIP traffic, when the Commission itself has expressly stated that "Internet Protocol (IP) telephony"—broadly defined to include the phone-to-phone VOIP service AT&T provides—is "exempt from [] access charges." *Intercarrier Compensation NPRM*, ¶ 133. In truth, it is retroactivity that would send a truly pernicious message that is absolutely at odds with the expressed desires of Congress and the Commission to foster development of Internet technology and services. VOIP providers have for years made investment decisions in accordance with their understanding, shared by everyone else in the industry, that the 1998 *Report* interpreted the Commission's rules to exempt VOIP from access charges until such time as the Commission ruled otherwise. Imposing retroactive liability would not only trigger endless, investment-retarding litigation over which prior period calls were and were not subject to access charges, but would chill future investment in Internet technology and services. Under the Bells' proposals, companies will no longer be able to rely on Commission statements concerning the regulatory regime that will govern such investments.[14]

In short, there is absolutely nothing on the statutory interest side of the balance that would favor retroactivity. In contrast, the ill effects of retroactivity – even apart from the "unscrambling the egg" dislocations and irreparable damage to the Commission's reputation – would be quite severe.

It is clear that AT&T and other VOIP providers reasonably understood the 1998 *Report* as a determination that VOIP is not subject to access charges. The Bells scoff at such reliance, but the Commission itself expressly stated that VOIP is "exempt" in the *Intercarrier Compensation NPRM*; individual Commissioners confirmed this understanding in numerous public statements before and after that *NPRM*; state regulators expressed and acted on such an understanding; industry participants, including the Bells themselves, acted in accordance with such an understanding; and the trade, academic and popular press uniformly reported such an understanding. The Bells' tortured parsing of the *Report*, and their attempt to narrow the plain language of the *Intercarrier Compensation NPRM* in no way demonstrates that this widespread understanding of the Commission's pronouncements was unreasonable.

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[14] *See* December 1, 2003 Opening Remarks of Chairman Powell at the FCC's Forum on VOIP ("No regulator, either federal or state, should tread into this area without an absolutely compelling justification for doing so. Innovation and capital investment depend on this premise. The entrepreneurs seated before us depend upon this premise. In my view, we should come to this forum with a sense of regulatory humility - mindful that it is entrepreneurs, not governments, who came up with the idea of making high-quality, inexpensive phone calls over the Internet").

Nor is there any merit to the suggestion that AT&T and other providers did not *actually* rely on the Commissions' statements when they offered VOIP services and concluded that they were not required to pay terminating access charges for such traffic. AT&T and other providers have affirmatively represented to the Commission that they did in fact rely on their understanding of the Commission's statements. For its part, AT&T installed innovative new equipment throughout its Internet backbone network and, indeed, was one of the driving forces pushing manufacturers to develop the new equipment that is making high quality VOIP transmission possible for other providers. The Bells cite no case suggesting that AT&T and others must disclose internal business and legal memoranda to support such representations, or that such reliance must be stated expressly in business press releases. In fact, the various press releases SBC cites, SBC Mem. at 12-13 & nn.53-55, *do* reflect such reliance: as common sense suggests, statements about the "efficiencies," "operational savings," and "cost savings" that providers hope to realize through their VOIP offerings all implicitly refer to, among other things, the savings that come from providing a service that is not subject to bloated access fees.

Unlike the situation in *Verizon*, moreover, AT&T and others have not relied on orders issued in a single proceeding that have been "under unceasing challenge before progressively higher legal authorities." 269 F.3d at 1110. The courts have found reliance on agency orders in such circumstances unreasonable. *See Clark-Cowlitz,* 826 F.2d at 1083 n.7 ("a *single, recent* agency decision . . . that is still in the throes of litigation when it is overruled" does not constitute a "well-established" agency position justifying reliance) (emphasis added). But here, by stark contrast, AT&T and other VOIP providers have relied on multiple agency pronouncements made in different proceedings that occurred several years apart, none of which has ever been challenged, let alone overruled.[15] Similarly, AT&T and VOIP providers have not relied on pronouncements in which the Commission expressly warned the industry that access charges might be retroactively imposed. *Cf. Exxon Co. USA* v. *FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) (reliance unreasonable where agency "warns all parties involved that a change in rates is only tentative and might be disallowed"). To the contrary, the Commission confirmed, without qualification, that VOIP services are "exempt from . . . access charges." *Report to Congress* ¶ 91.

Second, if the Commission retreats from these prior pronouncements and determines that VOIP traffic should now be subject to access charges, it will not be doing so "in response to judicial review, that is, when the purpose of the retroactive application is to rectify legal mistakes identified by a federal court." *Verizon*, 269 F.3d at 1111; *see also Pub. Utils. Comm'n of the State of Cal.* v. *FERC*, 988 F.2d 154, 161-63 (D.C. Cir. 1993) (normal rule against retroactive ratemaking relaxed where original order is found to be unlawful by a court). No court has ever been asked to determine whether the access charge rules apply to VOIP services. Nor could the Commission plausibly claim that such a retreat involves a unilateral act of "error" correction.

Even under the Bells' view, the 1998 *Report* established, at a bare minimum, that a classification of VOIP services as "telecommunications services" within the meaning of the

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[15] Contrary to SBC's suggestion, SBC Mem. at 15, the fact that there may be "controversies" (of recent vintage) between AT&T and some ILECs over whether AT&T should pay terminating access charges has no bearing on the reasonableness of AT&T's reliance on the Commission's pronouncements. The relevant test is whether the agency's policy is settled, and that is a function of whether the policy is challenged in court, not whether there are disputes between private parties. In all events, these "disputes" plainly are a product of SBC's opportunistic advocacy, not its contemporaneous understanding of the Commission's pronouncements, as confirmed by the facts that SBC willingly accepted VOIP providers' orders for alternative termination services and only recently took any steps to collect access charges.

access charge rules did not *compel* the conclusion that such traffic must pay access charges. If that were the case, the Commission would have had no justification for deferring a decision in order to assess the extent to which VOIP service providers "impose the same burdens on the local exchange as do other interexchange carriers." *Report to Congress*, ¶ 91. The Commission's identification of this factor as relevant to its analysis confirms the obvious: like other issues of interpretation and waiver, the applicability of the access charge rules to VOIP is a question of policy, not merely a matter of the dictionary definitions of the "plain language" of Commission regulations. Accordingly, even if, as the Bells mistakenly claim, the Commission has heretofore simply deferred deciding *whether* VOIP traffic is subject to access charges – contention squarely at odds with the Commission's express recognition that such traffic is exempt from access charges – any decision it makes now to subject such traffic to access charges does not render its earlier policy of deferral legally incorrect, and thus does not render the second policy an exercise in "error correction." *See U.S. Air Tour Ass'n* v. *FAA*, 298 F.3d 997, 1006 (D.C. Cir. 2002) (because an agency has "ample latitude to adapt [its] rules and policies to the demands of changing circumstances," both an initial policy and a subequently adopted policy can be reasonable) (quoting *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto Sales Co.,* 463 U.S. 29, 42 (1983)).

Accordingly, even if a decision to require payment of access charges simply involved a new application of existing law, the Bells had no clearly established right to recover such charges. Under these circumstances, retroactive application of the Commission's new policy would improperly impose a massive "new liability . . . for past actions which were taken in good-faith reliance on [agency] pronouncements." *Clark-Cowlitz*, 826 F.2d at 1084-85. By contrast, prospective application of such a policy will not deprive the ILECs of any funds to which they were already entitled, because the Commission has not committed any legal error in previously failing to require payment of access charges. *Cf. Exxon*, 182 F.3d at 49 ("when the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made").[16]

IV. Neither The Filed Rate Doctrine Nor Any Duty To Avoid Interference With Judicial Proceedings Justifies Retroactive Application Of Any Decision To Subject VOIP To Access Charges.

Because principles of administrative law plainly do not justify retroactive imposition of access charges on VOIP traffic, the Bells make the extraoardinary – and equally unfounded – claim that the filed tariff doctrine requires the Commission to impose such retroactive liability. That doctrine, however, is entirely inapplicable here, for two related reasons.

First, the Bells' FCC tariffs are also documents that too, require interpretation by the Commission and that are required to be construed in favor of customers. But there is no issue of tariff interpretation, for the Bells' tariffs do not expressly impose carriers' carrier charges on providers of VOIP services. Rather, the tariffs merely incorporate the Commission's rules by reference, imposing access charges on only those services that are subject to access charges under Rule 69.5. The Bells' tariffs are thus subject to the Commission orders that interpret or waive Rule 69.5. Once the Commission reaffirms or otherwise determines that phone-to-phone VOIP services that are terminated over ordinary business lines were not subject to access charges for past periods, it will follow that the Bells' tariffs impose no such charges and that there is no issue under the filed tariff doctrine.

[16] *See also Eastern Enterprises, Inc.* v. *Apfel*, 524 U.S. 498, 529, 532 (1998) (attaching new liability of $50 to $100 million to past conduct was constitutionally impermissible under takings clause).

Second, AT&T paid all tariffed charges for the ILEC services it purchased. In choosing to originate VOIP calls over Feature Group D access lines, AT&T paid the tariffed originating access charges for such lines. Similarly, in terminating such calls over ILEC local business lines, AT&T paid the tariffed charges for those lines as well, which do not include any terminating access fees. The Bells' argument is that AT&T *should have* purchased terminating access under their switched access tariffs and should not have been allowed to complete calls using different ILEC service offerings that the Bells willingly provided and with respect to which AT&T paid all of the required (and fully compensatory) fees and charges. That argument has absolutely no filed tariff implications.

In particular, imposition of retroactive liability for access charges is not necessary to ensure – and will not result in – payment of any tariffed charges that AT&T has failed to pay in the past. Failure to impose such retroactive liability in no way "limit[s] the [Bells'] ability to collect under [their] tariff[s]." Verizon Mem. at 21. Nor will such a failure result in retroactive invalidation of any tariffs. *See, e.g., id.* at 22. To the contrary, awarding the Bells the windfall of payments beyond those required under their tariffs would here violate the filed rate doctrine, which reflects "a statutory bias in favor of retroactive rate reductions *but not retroactive rate increases*." *Towns of Concord, Norwood, and Wellesley* v. *FERC*, 955 F.2d 67, 71 (D.C. Cir. 1992) (emphasis added).

Nor is it true, as Qwest claims, that "AT&T has incurred a legal indebtedness to Qwest" that the Commission cannot "forgive[]" by requiring VOIP providers to pay access charges on a prospective-only basis. Qwest Mem. at 2. Indeed, Qwest's entire submission improperly assumes the answer to the very question that this Commission must decide – *i.e.*, *whether* VOIP providers have always been required to buy access services to terminate their traffic.[17] From this, Qwest reasons that AT&T has already incurred a legally cognizable debt for past-due access charges, that the Commission must respect that debt in as-yet unfiled complaint proceedings or as-yet unfiled judicial actions, and that any finding of non-retroactivity in this proceeding would somehow constitute a "waiver" of this existing indebtedness.

But as AT&T has shown, the Commission construed its rules to *exempt* VOIP services such as AT&T's from the access charge regime, thereby obviating any claim of an existing indebtedness. Moreover, even if the 1998 *Report* and the Commission's subsequent statements could plausibly be understood to have left open the question whether access charges apply to VOIP services, the Bells have had no clearly established right to recover such charges. Rather, the answer to any such question involves an exercise of policy discretion. Thus, even under the Bells' self-serving and erroneous view that the 1998 *Report* deferred a decision on whether access charges applied to VOIP, there is no basis for any claim that AT&T necessarily owes a legally cognizable debt to Qwest for past-due access charges, or that the Commission would improperly "waive" that debt if it concludes – as it must – that any "clarification" that access charges do apply to VOIP should not be given retroactive effect.

Qwest's claim that the Commission *must* give retroactive effect to any determination, rendered in a complaint proceeding, that VOIP services have always been subject to access charges, Qwest Mem. at 4-9, is likewise mistaken. *Verizon* itself involved a Commission decision rendered in a complaint proceeding, yet the D.C. Circuit in that case applied the multi-factor balancing test, not the categorical rule Qwest advocates. The cases Qwest cites for that

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[17] *See* Qwest Mem. at 3 ("*If* AT&T violated the law by not paying [access] charges, the Commission may not retroactively eliminate AT&T's liability") (emphasis added).

categorical rule, moreover, predate *Verizon*, and involve situations in which the Commission simply refused to rule on the complaint. *See AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992) (dismissing complaint on ground that Commission would resolve issue through rulemaking); *MCI* v. *FCC*, 10 F.3d 842 (D.C. Cir. 1993) (dismissing complaint that sought damages for past conduct based on the "*non sequitur*" that prior rulemaking blessed the same conduct prospectively). In all events, no complaint proceedings for past-due access charges have been initiated, and the Commission is in fact deciding the question in a declaratory ruling proceeding.

V. Even If The Commission Concluded That AT&T And Other Carriers Violated Commission Rules By Not Purchasing Termination For VOIP Services Out Of Access Tariffs, The Commission Could And Should Exercise Its Remedial Discretion To Waive Any Obligation To Pay Damages For Those Violations.

As AT&T has previously explained, even where an agency determines that its rules apply and have been violated, it retains remedial discretion to determine that the public interest would be better served by maintaining the *status quo* for past periods. *See*, *e.g.*, *Connecticut Valley* v. *FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000) ("the breadth of agency discretion is at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions"); *Towns of Concord*, 955 F.2d at 76 ("Because the 'equitable aspects of refunding past rates are…inextricably entwined with the [agency's] normal regulatory responsibilit[ies],' absent some conflict with the explicit requirements or core purposes of a statute, we have refused to constrain agency discretion"). Thus, even if the Commission could, consistent with its prior statements and actions, determine that § 69.5 has applied to VOIP traffic all along, it would be entirely appropriate and lawful for the Commission to determine, as a matter of remedial discretion, that the Bells should receive no additional payments for past periods, above and beyond the compensatory rates that they have already been paid.

The Bells argue that the remedial discretion cases AT&T has cited apply only to the Commission's "authority to impose penalties for a violation of the Commission's rules," and *not* to its "authority to deny retroactive effect to a determination that those rules have been violated." SBC Mem. at 18. This claim, like so many others the Bells advance, is utterly baseless. The D.C. Circuit has explained that an agency "ordinarily has remedial discretion, *even in the face of an undoubted statutory violation*, unless the statute itself mandates a particular remedy." *Connecticut Valley* 208 F.3d at 1044 (emphasis added). In *Towns of Concord*, moreover, the D.C. Circuit upheld a decision in which an agency refused to award retroactive refunds for an acknowledged violation of its regulations and, in doing so, rejected the reasoning the Bells offer here – namely, that because the company had violated agency rules and overcharged its customers, refunds were required to ensure that agency regulations could not be violated with impunity. 955 F.2d at 70. The D.C. Circuit rejected that argument, concluding that the agency possessed the remedial discretion to dispense with retroactive relief. *Id.* at 72-73.

The retroactive payment of access charges the Bells seek here is indistinguishable from the retroactive refunds sought in *Towns of Concord*. There, the towns claimed they were deprived of the economic benefit of funds they would not have paid but for the regulatory violation; here, the Bells claim they were deprived of the economic benefit of funds they should have received but for the regulatory violation. And, as shown above, the failure to provide retroactive relief would not violate any of the Communications Act's "core purposes" – such as its anti-discrimination provisions, the universal service funding obligations or the filed rate doctrine, *see* Verizon Mem. at 20-22. Accordingly, the Commission plainly has the remedial discretion to waive any retroactive liabilities that it now recognizes, and would not abuse its broad remedial discretion by doing so.[18]

The Commission is likewise free to grant retroactive waivers to phone-to-phone VOIP providers in the event it finds that they would otherwise be subject to past period access charges. *See*, *e.g.*, *See* Order, *Matter of Universal Service*, 15 FCC Rcd. 8544 ("Waiver is therefore appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule") (granting retroactive waiver to utility from conditions on receipt of Lifeline support); Memorandum Opinion and Order, *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc.*, 16 FCC Rcd. 16710 (2001) (retroactive waivers for phones sold in violation of FCC rules); Memorandum Opinion and Order, *Federal-State Joint Board on Universal Service; Petition of the Public Service Commission of the District of Columbia for Waiver*, 15 FCC Rcd. 21996 (2000) (retroactive waivers for receipt of universal service subsidies prior to eligible telecommunications carrier status); Order, *Federal-State Joint Board on Universal Service*, 15

[18] Qwest suggests that the Commission has no remedial discretion in the Section 206 context. Of course, the Commission is not here operating in that context and neither Qwest nor any other LEC has brought a Section 206 complaint seeking retroactive payment of access charges on VOIP traffic. In any event, the Commission *did* first balance equitable considerations, including reasonable reliance, in determining whether to award damages in the principal Section 206 decision upon which Qwest relies, *see* Memorandum Opinion and Order, *Communications Vending Corporation of Arizona, Inc.* v. *Citizens Communications Company*, 17 FCC Rcd. 24201, ¶ 36 (2002) ("On balance, we believe that the Complainants' equitable interest in receiving compensation for payment of unlawfully assessed charges . . . outweighs any reliance that the Defendants may have had"). Likewise, the D.C. Circuit stressed in *Verizon* (which led to *Communications Vending Corp.* on remand) that an appropriate finding of retroactive *liability* does not mean that retroactive *damages* are required or even allowed. 269 F.3d at 1101 ("the LECs are not foreclosed from presenting their equitable concerns to the agency during the next phase of the proceedings. We therefore express no opinion as to the Commission's authority to impose damages on the LECs for charges that they may have collected in reliance on the agency's initial (and mistaken) interpretations").

FCC Rcd. 8544 (1999) (retroactive waivers of rule requiring state commission approval for receipt of universal service subsidies for Lifeline services); Memorandum Opinion and Order on Reconsideration, *Sanborn Telephone Cooperative, et al.*, 1999 WL 700555, ¶ 25 (1999) (retroactive waiver of study area designation for purposes of calculating DEM weighting). The Bells assert that a waiver of any access charge obligations on phone-to-phone VOIP providers would be an impermissible "evisceration" of the access charge rule. But that is absurd given that the access charge rule would continue to provide to all traffic that was contemplated when the rule was promulgated.

The Bells also suggest two new limitations, for which they are unable to cite a single precedent, on the Commission's clear authority to grant *retroactive* waivers. *See* SBC Mem. at 18. They first claim that although the Commission may grant "individualized" retroactive waivers to a single carrier that has violated a rule, the Commission may not grant the same retroactive waiver to a class of similarly situated carriers. The Bells offer no reason why that should be so, and any such limitation would truly elevate form over substance, as, under the Bells' logic, the Commission could simply grant individual retroactive waivers to each affected carrier. Second, the Bells claim that a retroactive waiver would be inappropriate here, because it would impose "significant financial burdens" on them. That is patently false. The Bells have already been paid for all of the termination services that they provided at rates that the Commission and other regulators have determined are fully compensatory. All that the Bells seek here are windfalls and additional ways to impede competition by raising their competitors' costs.